

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

ISRAEL CANTU HERRERA,

TDCJ-CID No. 1156104

Petitioner,

VS.

DOUG DRETKE,

Respondent.

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CIVIL ACTION NO. C-04-532

**OPINION AND ORDER DENYING RETURN OF FUNDS AND ORDER
VACATING COLLECTION ORDER**

Final judgment dismissing petitioner's § 2254 petition was entered August 1, 2005 (D.E. 24, 25). Petitioner timely filed notice of appeal on August 19, 2005 (D.E. 26). After petitioner moved for leave to proceed *in forma pauperis* (D.E. 28), his motion was granted by undersigned United States Magistrate Judge but he was ordered to pay the \$255 appellate filing fee in installments (D.E. 31). Petitioner did not seek review of this order by the District Court, nor did he appeal it to the Fifth Circuit. The Fifth Circuit Court of Appeals denied petitioner a certificate of appealability on August 8, 2006 (D.E. 34).

Since the collection order was entered on September 9, 2005, \$113.32 has been collected from petitioner. Petitioner now moves for return of those funds (D.E. 38). On October 16, 2009, the Fifth Circuit Court of Appeals decided *Garza v. Thaler*, 585 F.3d 888 (5th Cir. 2009), reversing an order, similar to the one entered in this case, to collect the filing fee in a § 2254 case. The petitioner in *Garza* timely challenged the collection order before the District Court and before the Fifth Circuit. Here petitioner did not

complain of the collection order when it was entered; nor did he timely challenge the order within a reasonable period of time after the *Garza* case was decided. On June 20, 2012, almost three years later, petitioner filed a motion requesting return of the appellate filing fees which have been collected in this case.

Because petitioner did not challenge the fees when assessed or when the *Garza* case was decided, his motion is not timely. The court declines to return fees which have already been collected. However, the court does vacate the collection order, and directs that TDCJ-CID not collect any further appellate filing fees from petitioner in this case.

The Clerk of the Court will send a copy of this order to TDCJ—Office of General Counsel, Post Office Box 13084, Austin, Texas 78711.

ORDERED this 27th day of June, 2012.


B. JANICE ELLINGTON
UNITED STATES MAGISTRATE JUDGE